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PRIOR CONSULTATION IN LATIN AMERICA SYMPOSIUM

Symposium: Prior consultation in Latin America – The Case of Brazil

Ambivalent implementation – Creating a framework for prior consultation in Brazil

CHARLOTTE SCHUMANN — 25 November, 2015

ILO Convention 169 – an old but still powerful tool

Adopted in 1989, Convention 169 of the International Labor Organization is the only internationally binding legal document that defines indigenous and tribal people's rights, with a special focus on the right to consultation and participation in legislative

and administrative measures that might affect territories of these people. The Convention today is ratified by 22 countries worldwide, 15 of them in Latin America. All signatory countries are subject to supervision with regard to the implementation of the Convention's precepts. The supervision bodies include a Committee of Experts as well as a tripartite Committee where workers', governments' and employers' representatives discuss cases of implementation of the ILO's norms.

While Brazil ratified ILO Convention 169 in 2002, no consultation of measures affecting indigenous or tribal peoples in Brazil has been realized until today without fierce contestations by the consulted groups or support groups. The public debate on subjects of the right to prior consultation included initially Afro-brazilian communities as well as the large group of traditional peoples. Defining legitimate representatives and adequate consultation procedures for these groups were major challenges in the regulation process.

A legal framework for consultations in Brazil

After rising protests against the top-down implementation of infrastructure and energy projects and repeated appeals to international Human Rights Fora, the Brazilian government initiated a national legislative process in January 2012 with the creation of an Interministerial Working Group that was set up in order to prepare a draft bill for prior consultation as defined in ILO Convention 169. Internal governmental debates were accompanied by the attempt to consult the groups regarded as representatives of indigenous and tribal peoples as well as the broader civil society in Brazil on the form and content of the new norm. These consultations represented new arenas for negotiating prior consultation in the context of a series of older contested issues between the Brazilian government and social

movements. The process of negotiating a national interpretation of the principles laid down in ILO 169 was characterized by a vivid discussion about Brazil's path to development and by strong (institutional) oppositions between environmental and Human Rights groups and the powerful agro-industrial sector. A complex play of power between governmental, civil, juridical and economic forces was enacted in the struggle to determine the prevailing understandings of prior consultation in the country, and finally no solution could be achieved. A national norm on prior consultation is pending to this day, and the reaction of the supervisory bodies of the ILO is eagerly awaited by proponents of the regulation in Brazil.

This case study shows the difficulties of discussing actors, tools and impact of the international precepts of prior consultation on a national level. Different from a classic case study on consultation of a contested mining project, road or power plant, its setting is the administrative center Brasília and the actors of this study are the political representatives who are negotiating a possible format for legal regulation. Understanding their strategies, claims and expectations will reveal important perspectives on the possibilities and limits of legal regulation of political conflicts , with specific regard to the problems of the national implementation of international law.

Integrating international law in the national legal framework

The negotiations about a national legal framework for prior consultation dealt with defining its attributes as well as the meaning of free, prior and informed consent in Brazil (the process focused on creating a regulation for prior consultation as defined in ILO Convention 169 but included definitions and discussions related to UNDRIP as well as the existing Inter-American jurisprudence). Especially indigenous groups

questioned whether consultations can facilitate “free consent” without the right of the consulted groups to reject a project in the case that there is no consent. On the other hand, for the Brazilian administration, many questions evolved around the necessary stage of planning and study of the possible effects of a project that is needed in order to support informed and prior decisions on the projects in question. Already existing instruments of environmental mitigation and related participatory formats were screened in the search for a model format for participation as envisioned in ILO Convention 169. Apart from this, legitimate actors of consultation processes had to be defined: Which state institution could be a legitimate head of these consultations? Which legally defined identity categories in Brazil should be considered as being addressed by the category of “indigenous and tribal peoples”? The attempt to regulate prior consultation in Brazil is an excellent example of how the process of „settling“ international Human Right standards in national contexts is subject to a variety of discursive strategies and material power relationships of the different participating actors on all scales – from international Human Rights Forums to village chiefs. In this regard, settling the question of what prior consultation is finally all about in concrete contexts means setting the frame for its possible formats, scope and effectivity as a participatory tool.

Conclusion

The promise of international law to regulate social relationships and inequalities together with and beyond the framework of national law includes processes of interpretation rather than mere implementation. Interpreting international law in the context of national legal frameworks includes the (re-)framing of existing actors, institutions and means of conflict resolution. Situations of superimposition and interpenetration of different

legal spheres („interlegality“, cf. Sousa Santos 1987) constitute a competitive setting for different norm interpretation contexts and frameworks within which the right to consultation is embedded in each national context. In Brazil, social protests continue to claim clear legal safeguards for the participation of indigenous and tribal peoples in decisions concerning the fate of their livelihoods. So far, it looks like the ball has been played back to the ILO supervisory bodies and other international fora to insist on a positioning of the Brazilian government on concrete measures and definitions for prior consultation.

Charlotte Schumann (MA) is a PhD candidate at the Freie Universität Berlin (FU), Institute for Latin American Studies.

ISSN 2510-2567

Tags: *Anthropology of International Law*, *Law and Society*

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